In the circumstances, the application of the plaintiff is dismissed and the determination of the Council is affirmed. The plaintiff is to pay costs of the Law Society.

Order accordingly.

Solicitors: *B. Mohan Singh & Co.; A.C. Fergusson.*

UNITED OVERSEAS BANK LTD. v. FORWARD OVERSEA CREDIT LTD.

[O.C.J. (Grimberg J.C.) January 18, 1988]

[Singapore – Originating Summons No. 900 of 1987]

Land Law – Mortgage and charge – Mortgage registered in Registry of Deeds and later under Companies Act – Charge created meanwhile – Charge registered at Registry of Deeds – Priorities – Registration of Deeds Act (Cap. 269, 1985 Ed.), s. 15 – Companies Act (Cap. 50, 1985 Ed.), s. 131(1).

On May 30, 1985, G.S. Corporation (Singapore) Pte. Ltd. created a mortgage over its immovable property in favour of the defendants. The mortgage was registered at the Registry of Deeds on March 3, 1986. By virtue of section 131(1) of the Companies Act, the mortgage was liable to be lodged with the Registrar of Companies for registration within 30 days. The mortgage was, however, not registered within the time stipulated. After the expiry of the period, the defendants applied for an extension of time for a further period of 30 days (the first extension). On October 13, 1986 the extension was granted.

Meanwhile, the plaintiffs obtained judgment against G.S. Corporation for certain sums of money. On November 4, 1986, a charging order nisi against the property (which is the subject-matter of the mortgage) was obtained. On November 15, 1986 the charging order was registered at the Registry of Deeds.

Before the first extension ended, the defendants applied for a further extension of time of 30 days to register their mortgage. On January 5, 1987, the extension was granted (the second extension). The order was expressed to be made without prejudice to the rights acquired by United Overseas Bank Ltd. or any person prior to the time of actual registration of the said mortgage. On the same day, the charging order nisi was made absolute.

On January 16, 1987, the defendants registered their mortgage at the Registry of Companies.

In the present case, the plaintiffs sought (a) a declaration that the mortgage was void against the plaintiff's charge by virtue of section 131(1) of the Companies Act; and (b) a declaration that the plaintiffs were entitled to the proceeds of the sale of the property, it having been sold by the defendants as mortgagees.

Held: (1) the defendant's mortgage was registered under the Registration of Deeds Act some eight months or more before the plaintiffs' charging order nisi was registered. The mortgage being a valid charge *ab initio* as a consequence to its registration under Companies Act the defendants' legal mortgage had priority over the plaintiffs' equitable charge which was postponed to the mortgage by virtue of section 15 of the Registration of Deeds Act;

(2) the proviso to the order dated January 5, 1987 did nothing more than preserve the plaintiffs' right to assert, in the light of the defendants' subsequent lawful compliance with section 131(1) of the Companies Act, that the plaintiffs' security nevertheless ranked in law in priority to that of the defendants. The plaintiffs have exercised that right unsuccessfully;

(3) the application was dismissed.

Cases referred to:

(1) *In re Monolithic Building Company* [1915] 1 Ch. 643.

(2) *Ram Narain & Ors.* v. *Radha Kishen Moti Lal Chamaria* L.R. 57 I.A. 76; A.I.R. 1930 P.C. 66.

ORIGINATING SUMMONS.

D. Barker for the plaintiffs.

P. Gurbani for the defendants.

Grimberg J.C.: On May 30, 1985 G.S. Corporation (Singapore) Pte. Ltd. ("the company") created a mortgage ("the mortgage") over its immovable property known as No. 399 River Valley Road ("the property") in favour of the defendants. The mortgage was registered at the Registry of Deeds on March 3, 1986. By virtue of section 131(1) of the Companies Act, the mortgage was liable to be lodged with the Registrar of Companies for registration within 30 days after its creation. That section is in the following terms:

> "Subject to this Division, where a charge to which this section applies is created by a company there shall be lodged with the Registrar for registration, within 30 days after the creation of the charge, a statement of the prescribed particulars and –
>
> (a) the instrument, if any, by which the charge is created or evidenced; or
>
> (b) a copy thereof together with an affidavit verifying the execution of the charge and also verifying the copy as being a true copy of the instrument,
>
> and if this section is not complied with in relation to the charge the charge shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company."

In the event, the mortgage was not registered within the period stipulated by section 131(1). On October 3, 1986, that is to say well after the

period for lodgment had expired, the defendants' solicitors applied by *ex parte* originating summons for the time for registration of the mortgage to be extended for a period of 30 days from the date of the order made on the summons. The court is empowered to extend time by virtue of section 137 of the Companies Act, which reads:

"The court, on being satisfied that the omission to register a charge (whether under this or any corresponding previous written law) within the time required or that the omission or misstatement of any particular with respect to any such charge or in a memorandum of satisfaction was accidental or due to inadvertence or to some other sufficient cause or is not of a nature to prejudice the position of creditors or shareholders or that on other grounds it is just and equitable to grant relief, may on the application of the company or any person interested and on such terms and conditions as seem to the court just and expedient (including a term or condition that the extension or rectification is to be without prejudice to any liability already incurred by the company or any of its officers in respect of the default) order that the time for registration be extended or that the omission or misstatement be rectified."

The originating summons came before the learned Chief Justice, who on October 13, 1986 granted an extension of 30 days from that date. Thus the defendants had until November 13, 1986 ("the first extension") within which to register the mortgage in accordance with the requirements of section 131(1).

Meanwhile, the plaintiffs had on January 27, 1986 obtained judgment against the company for $815,020.82 due on an overdraft, and $264,159.20 due under trust receipts.

On November 4, 1986, that is to say during the first extension, the plaintiffs obtained a charging order nisi against the property by which, unless sufficient cause to the contrary was shown, the property stood charged with payment of the judgment debt. On November 15, 1986 the charging order nisi was registered at the Registry of Deeds.

Before the first extension ended the defendants applied, by way of another originating summons, for a further extension of time of 30 days within which to register their mortgage.

Although not parties to the application, the plaintiffs were served and their counsel was heard, when the originating summons came before the learned Chief Justice on January 5, 1987.

In the event, he granted a further extension of time of 30 days from that date ("the second extension") for the registration of the mrotgage. The order was expressed to be made "without prejudice to the rights acquired by United Overseas Bank Ltd" (the plaintiffs in the originating summons which I am now called upon to determine) "or any other person prior to the time of actual registration of the said indenture of mortgage", that is to say the mortgage. I will refer to this part of the order as "the proviso".

On the day on which the second extension was granted, namely January 5, 1987, the charging order nisi obtained by the plaintiffs on November 4, 1986 was made absolute.

The next, and final event, in the chronology occurred on January 16, 1987. On that day, which was within the second extension, the defendants registered their mortgage at the Registry of Companies. It was not suggested on behalf of the plaintiffs during the hearing of this originating summons that either the first or the second extension was wrongly granted; or that it was otherwise than just and equitable that the defendants should have had the extensions for which they applied.

In this originating summons the plaintiffs seek:

(i) a declaration that the mortgage was void against the plaintiffs' charge, by virtue of section 131(1) of the Companies Act; and

(ii) a declaration that the plaintiffs are entitled to the proceeds of the sale of the property, it having been sold by the defendants as mortgagees.

Miss Barker, for the plaintiffs, argued that upon the plaintiffs obtaining their charging order nisi against the property on November 4, 1981, the plaintiffs acquired, apart from the right of an equitable chargee, the right to assert that the defendants' mortgage, which was then unregistered, was void against the UOB. That proposition, she said, flowed from the construction of section 131(1), and from the proviso.

Miss Barker contended that the plaintiffs acquired their rights at a time when the mortgage was void. It had been executed on May 30, 1985 and should, by virtue of section 131(1), have been registered by June 30, 1985. However, it was not registered until January 16, 1987, and accordingly it was void for the whole of the intervening period. The effect of the proviso was

to preserve that position for the benefit of the plaintiffs.

Miss Barker relied on *In re Monolithic Building Company.*[1] The case turned on the meaning of section 93 of the Companies (Consolidation) Act 1908, which section is in similar terms to section 131(1) of the Companies Act of Singapore. The facts, to the extent that they concern me, were that the Monolithic Company ("Monolithic") mortgaged its land to the plaintiff. The mortgage was not registered in accordance with section 93, due to a mistake. The plaintiff obtained an order for the time for registration to be extended "without prejudice to the rights of parties acquired prior to the time when such mortgage should be actually registered". The mortgage was registered within the period claiming, *inter alia,* priority for the mortgage over a mortgage debenture issued to the defendant Jenkins, some nine months after the plaintiff's mortgage, and a sub-mortgage later created by Jenkins in favour of a certain Calway. Astbury J. held that the plaintiff was entitled to her security in priority to the securities of Jenkins and Calway.

Jenkins appealed, and his appeal was allowed. In the course of his judgment, Lord Cozens-Hardy M.R. said (at p. 662):

> "I propose to consider the language of section 93 without having my mind influenced for the moment – I had almost said without having my mind poisoned for the moment – by consideration of any authorities or other Acts dealing with this question. This was a mortgage on land executed by a company, and section 93 says: (The Master of the Rolls read the section and continued). Mr Jenkins, of course, was the creditor of the company in respect of his registered debenture. That is quite plain. This section says that so far as any security under the property comprised in the unregistered mortgage is concerned it is to be void against the liquidator, and any creditor of the company unless registered within this period. What does that mean? I confess my inability to see that it means anything else than exactly what it says, namely, that it is void against any creditor who has a registered charge on the company's property. I cannot myself see any reason to doubt that, as a matter of construction of this section."

It was urged upon me by Miss Barker that, although I am concerned with the position of a charging order (which both counsel agreed is not required to be registered by virtue of section 131(1)), the security provided by the company under the mortgage is void against the plaintiffs, a creditor of the company, the mortgage not having been registered within the time stipulated by section 131(1). Just as in the *Monolithic* case[1], said Miss Barker, the defendants' prior unregistered mortgage is obliged to rank subsequent to the plaintiffs' equitable charge. The effect of the proviso was to ensure that the defendants' mortgage, even when registered, remained void as against the plaintiffs' equitable charge.

Mr. Gurbani, for the defendants, contended that once his clients' mortgage had been registered within the period of the second extension, the defendants were in all material respect in the same position *vis-a-vis* the plaintiffs' charge, is the mortgage had been registered within the primary thirty days allowed for registration by section 131(1).

Mr. Gurbani relied on *Ram Narain and Others* v. *Radha Kishen Moti Lal Chamaria.*[2] That was a case which concerned the effect of sections 109 and 120 of the Indian Companies Act, and an order extending time for the registration of a mortgage which contained a term similar to the proviso in the case before me. The facts were that a company created two mortgages on the same day, that is August 10, 1922, over part of its immovable property. Neither mortgage was registered within 21 days in compliance with section 109, the equivalent of our section 131(1). However, time having been extended under section 120, equivalent to our section 137, the second mortgage was registered on November 23, 1922, and the first on December 22, 1922. The order granting the extension of time in the case of the first mortgage provided that registration was to be "without prejudice to the rights of any mortgagee accrued in the meantime". The question arose as to the relative priorities of the two mortgages, and it was held that the effect of the order extending time for the registration of the first mortgage was not to give the second mortgage priority over the first mortgage.

The second mortgage expressly stated that it was to be treated as a second mortgage against the property over which the first mortgage was created. Counsel for the second mortgagee argued that the second mortgage had priority over the first mortgage because the second mortgage was prior in terms of date of registration under the Act, and because the order, by which time for registering the first mortgage was extended, provided that the extension should be "without prejudice to the rights of any mortgagee accrued in the meantime". It was said on behalf of the second mortgagee that by registering its mortgage first, the second mortgagee's rights could not be prejudiced by the subsequent order granting an extension of time for the registration of the first mortgage, and by its actual registration.

Sir Lancelot Sanderson, who delivered the judgment of the Privy Council, said:

"By the terms of section 120 the court, when extending the time for registration, has a discretion to impose such terms and conditions as it thinks just and expedient, and the material words of the order in this case are "without prejudice to the rights of any mortgagee accrued in the meantime'.

The phraseology of the order is not very precise, but their Lordships assume that 'in the meantime' must be taken to mean the period between the date when the bank's mortgage should have been registered and the date of actual registration. This period would cover November 21, 1922, when the plaintiffs' mortgage was registered.

Section 109 provides that a mortgage, such as the bank's mortgage of August 10, 1922, shall so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company unless the prescribed particulars are filed with the registrar within twenty-one days after the date of its creation. It is to be noted that the section does not avoid the mortgage absolutely, but only so far as any security is given thereby on the company's property or undertaking. The effect, therefore, is that if a mortgage is not registered it is valid as an admission of debt, but as against a creditor or the liquidator it could not be said that a valid charge on company's property had been created. But it is provided by section 120 that the court may extend the time for registration in a proper case, as was in fact done in this case. What then, was the effect of the registration of the bank's mortgage within the extended time?

In their Lordships' opinion, the court having extended the time for registration, and the mortgage having been registered within that time, the mortgage was constituted a valid charge *ab initio, i.e.* from the date of its execution – namely, August 10, 1922, subject only to such conditions as were imposed by the court in the order which extended the time.

If that be so, the bank's mortgage on registration became a valid charge on the refinery as from August 10, 1922, and the plaintiffs' mortgage of August 10, 1922, which also was registered within the time extended by the High Court, became a valid charge from August 10, 1922, on the refinery and the distillery; but on the face of the plaintiffs' mortgage it was only a second charge upon the refinery.

But it was said on behalf of the plaintiffs that a right to enforce their mortgage had accrued to them on the registration of the mortgage on November 21, 1922, and by the order of the court such right was not to be prejudiced. The right which the plaintiffs had to enforce their mortgage against the property of the company depended not only upon the registration, but also on the terms of the mortgage itself, and the right which they had to enforce in respect of the refinery was a second charge only. The order of the court of December 21, 1922, that it should be 'without prejudice to the rights of any mortgage accrued in the meantime', in their Lordships' opinion, could not have been intended to convert the plaintiffs' second charge upon the refinery into a first charge thereon.

The learned counsel for the plaintiffs-appellants, in support of his arguments, referred to the decision *In re Monolithic Building Co.*[1], which decided that section 93 of the Companies (Consolidation) Act 1908 avoids an unregistered mortgage as against a subsequent registered incumbrancer, even though he had express notice of the prior mortgage at the time when he took his own security.

The facts of the present case are materially different from the facts of the cited case, especially by reason of the fact that the plaintiffs' mortgage contains an express term that it is a second charge on the refinery. Further, the learned judges who decided the cited case seem to have dealt with it 'in reference to the difference of position between a registered secured creditor and a prior unregistered secured creditor': see judgment of Cozens-Hardy M.R. [in *In re Monolithic Building Co.*[1]]; the effect of the subsequent registration of the prior creditor's security within the time extended by the court does not seem to have been considered.

Their Lordships are of the opinion that there is nothing in the order of High Court of December 6, 1922 which interfered with the priority of the bank's mortgage upon the refinery over the plaintiffs' mortgage therein."

Ram Narain's case[2] concerned two registrable instruments. In the present case, the defendants had a mortgage, which was registrable, and the plaintiffs had an equitable charge, which was not. That difference does not affect my consideration as to how the decision in *Ram Narain* bears on the present case. The effect of the judgment of the Privy Council is clear enough. Once the present defendant's mortgage was registered within the period of the second extension then, to use the words of Sir Lancelot Sanderson, "the mortgage was constituted a valid charge *ab initio, i.e.* from the date of its execution", namely, May 30, 1985. Since the Privy Council specifically considered the effect of the subsequent registration of the prior creditor's security within the time extended by the court, while the Court of Appeal in the *Monolithic* case[1] appears not to have done so, I regard the decision in the Indian case to the decision that I should follow.

I am therefore obliged to look at the two instruments in view of the status which is accorded to them now, by law. What the rights of the parties are falls to be determined in the light of the subsequent registration of the defendants' mortgage. Rights may arise, as they did in the *Ram Narain* case[2], by contract (the plaintiffs' mortgage having contained an express term that it was to create a second charge over the mortgagor's property); or they may arise by virtue of statute, as in my judgment occurs in the present case, by reason of section 15(1) of the Registration of Deeds Act.

That section provides as follows:

"Subject to this Act, all instruments registered under the Registration of Deeds Ordinance 1886 or entitled to the registered under this Act have priority according to the date of their registration and not according to the date of the instruments or of their execution."

The defendants' mortgage was registered under the Registration of Deeds Act on March 3, 1986, some eight months or more before the plaintiffs' charging order nisi was registered. The mortgage being a valid charge *ab initio* as a consequence of its registration under the Companies Act on January 16, 1987, I find that the defendants' legal mortgage had priority over the plaintiffs' equitable charge, which was postponed to the mortgage by virtue of section 15 of the Registration of Deeds Act.

I regret that I am unable to accept Miss Barker's argument, strenuously put, that the mortgage not having been initially registered in accordance with section 131(1) of the Companies Act becomes void against the plaintiffs' charge, and remained void forever thereafter by reason of the proviso. In my judgment, the proviso did nothing more than preserve the plaintiffs' right to assert, in the light of the defendants' subsequent lawful compliance with section 131(1), that the plaintiffs' security nevertheless ranked in law in priority to that of the defendants. The plaintiffs have now exercised that right, in the event unsuccessfully.

In the result, I decline to grant the plaintiffs the declarations they seek, and dismiss their application in this originating summons with costs.

Order accordingly.

Solicitors: *Khattar Wong & Partners; Prakash Gurbani & Chong.*

BRIGHTSIDE MECHANICAL & ELECTRICAL SERVICES GROUP LTD. & ANOR. v. HYUNDAI ENGINEERING & CONSTRUCTION CO. LTD.

[A.C.J. (Thean J.) January 8, 1988]

[Singapore – Suit No. 1130 of 1987]

Civil Procedure – Summary judgment – Provisional interpretation of contractual term – Arguable point of law raised – Leave to defend.

Contract – Building contract – Provisional interpretation of contractual term of payment.

The plaintiffs were the mechanical sub-contractor for Marina Centre. The defendants were the main contractor. Payments were to be made by the plaintiffs under certificates of payment issued by the architect. The architect certified a sum of some S$1.6 million as being due to the plaintiffs which, after the allowable deduction, came to S$924,711. Owing to delays in the completion of the project, the owners declined to make any payment to the defendants, the main contractors, holding the money due to be set-off against liquidated damages to be paid for the delay. The defendants in turn declined to pay the sum of S$924,711 certified as payable to the plaintiffs. The plaintiffs sued the defendants for this sum and applied for summary judgment. The defendants applied for a stay of proceedings pending arbitration. The defendants also relied upon clause 11(b) of the sub-contract, which provided that "within five days of the receipt by the contractor of the sum included in any certificate of the architect the contractor (the defendants) shall notify and pay to the sub-contractor (the plaintiffs) the total value certified therein..." It was the defendants' contention that as they had not received any money from the owner they were not liable to pay anything to the sub-contractor. The Assistant Registrar ordered the proceedings to be stayed pending the arbitration and made no order on the plaintiffs' application for summary judgment. The plaintiffs appealed.

Held, dismissing the appeal: (1) *prima facie,* clause 11(b) contemplated the actual receipt by the main contractor of the sum included in the certificate and that until the defendants received from the owner the sum claimed by the plaintiffs they were not obliged to pay it to the plaintiffs. In this case, there was no actual receipt by the defendants of the amount certified by the architect. This view of the construction of clause 11(b) was only a provisional one;

(2) the general principle is that where an issue raised in an Order 14 application is one of law and is clear-cut, it should be disposed of rather than let it go for trial. If a point of law is raised on behalf of the defendants which the court feels able to consider without reference to contested facts simply on the submissions of the parties, the court will do so in order to see whether there is any substance in the proposed defence. If the court concludes that the point is bad, although arguable, it will give judgment for the plaintiffs. But if the case raised problems which should be argued and considered fully, then it will give leave to defend. Applying these principles, the plaintiffs were not clearly entitled to judgment in view of the point of law raised by the defendant, *viz,* the construction of clause 11(b). There was therefore a dispute which had to be referred to arbitration.